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NOV 03 1999

LEGAL AFFAIRS DIVISION
DEPARTMENT OF FISH AND GAME

**BEFORE THE ACTION DISPUTE RESOLUTION SERVICES
ARBITRATOR AND REPRESENTATIVE ARBITRATORS**

**FOOTHILL GOLF AND
DEVELOPMENT, LLC, a California
limited liability company.**

Petitioners,

vs.

**CALIFORNIA DEPARTMENT OF FISH
AND GAME, a California State
government agency.**

Respondent.

ADRS Case No. 99-0600-DW

**ARBITRATION PANEL FINDINGS
AWARD AND JUDGMENT**

**HEARING DATES: JULY 5, 6, 7, 19, 20
1999**

TIME: 9:00 A.M.

**PLACE: Hon Diane Wayne, (Ret.)
2049 Century Park East, Suite 350
Los Angeles, CA 90067**

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INTRODUCTION

This arbitration was convened pursuant to Section 1603(b)(2) of the California Fish and Game Code to settle disagreements and make binding decisions regarding fish and wildlife modifications to a notification of streambed alteration submitted by Foothill Golf and Development, LLC ("Foothill") to the California Department of Fish and Game ("DFG").

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28 **I.**

INTRODUCTION

This arbitration was convened pursuant to Section 1603(b)(2) of the California Fish and Game Code to settle disagreements and make binding decisions regarding fish and wildlife modifications to a notification of streambed alteration submitted by Foothill Golf and Development, LLC ("Foothill") to the California Department of Fish and Game ("DFG").

1 Foothill proposes to develop a Championship 18-hole golf course (the "Project") in the Big
2 Tujunga Wash area of Los Angeles.

3 II.

4 FINDINGS

5 The arbitration panel heard and considered oral and documentary evidence presented by
6 Foothill and the DFG during five days of hearings on the matter. Both parties submitted proposed
7 conditions for a Streambed Alteration Agreement ("SAA") as contemplated in Section 1603 of
8 the California Fish and Game Code¹ with accompanying proposed geographical delineations of
9 the DFG's jurisdictional boundaries on the Project site. Based upon the evidence presented by the
10 parties, the arbitration panel issues the following Findings:

11 1. Background.

- 12 a. The Project site is privately owned by Los Angeles International Golf Clubs, Inc.
13 and leased to Foothill. The site is approximately 352 acres, located at 9401
14 Foothill Blvd., in the Sunland-Tujunga-Lake View Terrace-Shadow Hills District
15 Plan area of the City of Los Angeles. The site is east of Foothill Blvd. and north of
16 Sunland, in the Tujunga Valley. Zoned for Open Space development, the site is
17 currently vacant. Site improvements include a portion of the Oro Vista Levee at
18 the northeast corner of the site and a subsurface 18-inch sewer line which crosses
19 the southern one third of the site. Frequent human activity on the site includes the
20 use of recreational off-road vehicles, equestrian activity, hiking, and occasional
21 unauthorized camping. In addition, evidence shows various levels of human
22 activity, including but not limited to the construction of a large berm or levee in the
23 north central portion of the site, a diversion channel cut from the southeast corner
24 of the site toward the center of the site, and the deposit of a significant amount of
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27 ¹ All references to code sections shall refer to the
28 California Fish and Game Code unless otherwise specified.

1 fill material from past residential construction previously deposited on the south
2 central portion of the site.

3 b. The site is characterized as an alluvial fan. Two primary water channels traverse
4 the site: a north channel and a south channel (sometimes referred to as the Haines
5 Channel). The amount of water in the channels varies from dry beds to flood
6 conditions, which occasionally overflow the channel banks, depending on the
7 amount of rainfall.

8 c. Various natural resources and wildlife are known to be located on the site,
9 including: coastal sage scrub, alluvial fan sage scrub, riparian woodland, slender-
10 horned spineflower (a state and federal endangered species), cactus wren, rufous-
11 crowned sparrow, coast horned lizard, coastal western whiptail, loggerhead shrike,
12 San Fernando spineflower, Nevin's barberry, silvery legless lizard, red-legged frog,
13 coastal rosy boa, coast patch-nosed snake, western spadefoot toad, white-tailed
14 kite, northern harrier, coastal California gnatcatcher (a state and federal
15 endangered species), prairie falcon, lesser nighthawk, Bell's sage sparrow,
16 California horned lark, western mastiff bat, Townsend's big-eared bat, pallid bat,
17 Los Angeles pocket mouse, and American badger. The Santa Ana Sucker, a
18 member of a community of fish known as the South Coast Minnow Sucker
19 Streambed community, are known to exist in waters upstream and downstream of
20 the site, and have the potential to exist on the site during high flow conditions.
21 The Santa Ana Sucker is currently under consideration of a proposed ruling as a
22 federal threatened species.

23 d. The involvement of the DFG with golf course development on the Project site
24 began in March, 1988. At that time, an entity known as Cosmo World proposed a
25 PGA golf course involving 263 acres of grading, 1.6 million cubic yards of cut and
26 fill, and 92 acres of preserve area. The City of Los Angeles (the "City") acted as
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1 lead agency pursuant to the California Environmental Quality Act ("CEQA"). The
2 City issued a Notice of Preparation in March, 1988 to which the DFG responded.
3 The DFG indicated that development of the golf course should occur outside a
4 floodplain of unspecified size, that an SAA with the DFG would be required, and
5 that notification pursuant Section 1603 for the SAA should be delayed until after
6 the lead agency approves the project. In January, 1989, the City circulated a Draft
7 Environmental Impact Report ("EIR"), to which the DFG responded in March,
8 1989. The DFG indicated that it would not oppose a project that avoided impacts
9 to alluvial fan sagescrub habitat and slender-horned spineflower, a state and federal
10 endangered species.

11 e. Foothill became involved with the site in March, 1995. Foothill filed an
12 application with the City to develop a smaller, championship golf course consisting
13 of 154 acres of grading, 646,000 cubic yards of cut and fill, and 192 acres of
14 preserve, including preservation of all know populations of the endangered
15 slender-horned spineflower, and avoidance of all impacts or development within
16 the jurisdictional waters of the U.S.

17 f. After a lengthy history, the Project was approved by the City Council on April 28,
18 1998. The Project approval included DFG's request for a 300-foot buffer of all
19 known populations of slender-horned spineflower, and consisted of the following:
20 *Final Environmental Impact Report for Los Angeles Golf Club*, EIR No. 95-
21 0286-(CUC)(CUB)(VAC), SCH No. 95051004, February 1996; *Los Angeles Golf*
22 *Club Addendum* dated 9 May 1997, prepared for the City of Los Angeles; and
23 "Conditional Use/Site Plan Review Conditions of Approval" for City Plan Case
24 96-0243 CUP and City Plan Case 96-0241 CUB, approved 28 April 1998 by the
25 Los Angeles City Council, and *Notice of Determination* (posted May 1, 1998)
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- 1 b. The DFG had the option to challenge the certified Final EIR as inadequate.
2 Having chosen not to do so, the DFG must accept the adequacy of the EIR for
3 purposes of the SAA process. PUB. RES. CODE § 21167.2; CEQA Guidelines
4 15096 and 15231. Therefore, all potentially significant impacts to fish and wildlife
5 resources within the DFG's jurisdiction that were identified as being mitigated to
6 less than significant levels in the Final EIR and corresponding findings of the City
7 are hereby deemed to be sufficient and adequate for purposes of the DFG on the
8 SAA process. Except for those impacts listed as significant and unavoidable in the
9 Final EIR and corresponding findings of the City, no additional conditions are
10 necessary to protect fish and wildlife resources within the jurisdiction of the DFG.
11 c. Not all of the Project's potentially significant impacts to fish and wildlife resources
12 are mitigated below a level of significance. Foothill does not dispute and the Final
13 EIR expressly states that development of the Project will have some significant
14 unavoidable impacts on certain of the biotic resources on the Project site.
15 d. The DFG presented evidence that avoidance of significant unmitigated impacts is
16 its preferred method for preventing impacts to fish and wildlife resources within its
17 jurisdiction.
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20 3. **Jurisdiction.**

- 21 a. For purposes of Section 1600 et seq., delineation of the DFG's jurisdiction is
22 determined by methods and approaches described in Section II of the DFG's Field
23 Guide to Lake and Streambed Alteration Agreements (Sept. 1994).
24 b. The DFG's authority to condition a project or development activity, or modify a
25 proposed project or development activity pursuant Section 1600 et seq. is limited
26 to the geographical boundaries of the DFG's jurisdiction.
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- 1 g. No action was brought by the DFG or any other party challenging the adequacy of
2 the Final EIR within that statute of limitations for bringing such an action.
- 3 h. On December 30, 1998 Foothill submitted a notification of streambed alteration to
4 the DFG and a Draft Long-term Habitat Management Plan reflecting the DFG's
5 asserted jurisdiction over the 100-year flood plain, which the DFG had first
6 indicated in 1995. With the exception of including off-site mitigation not required
7 by the City but requested by the DFG, Foothill's notification was identical to the
8 Project approved by the City.
- 9 i. By letter dated February 2, 1999, the DFG responded to Foothill's notification
10 with proposed modifications. The proposed DFG modifications included a
11 condition prohibiting all impacts within the DFG's jurisdiction and a 40-acre
12 expansion of the DFG's asserted jurisdiction beyond the 100-year flood plain for a
13 total asserted jurisdiction of approximately 210 acres.
- 14 j. By letter dated February 11, 1999, and pursuant to Section 1603(b)(1), Foothill
15 objected to the DFG's proposed modifications and requested that a meeting be
16 scheduled to resolve the differences between Foothill and the DFG. A meeting
17 was held on February 25, 1999 in Sacramento between Foothill's development
18 team and legal counsel and DFG staff and legal counsel. The February 25, 1999
19 meeting failed to resolve the disputes regarding the DFG's expanded jurisdiction
20 and proposed SAA conditions. Foothill and the DFG agreed to continue
21 negotiating the dispute until March 22, 1999. By letter dated March 22, 1999, the
22 DFG requested an extension until March 26, 1999 to propose new conditions
23 acceptable to Foothill. Foothill agreed to an extension on March 23, 1999. The
24 DFG did not revise its expanded jurisdiction or propose new conditions and, by
25 letter dated March 29, 1999, Foothill demanded arbitration pursuant to Section
26 1603(b)(2).
27
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1 k. On June 4, 1999 Foothill and the DFG signed and executed the AGREEMENT
2 REGARDING PROCEDURES FOR ARBITRATION UNDER FISH AND
3 GAME CODE SECTION 1603 CONCERNING PROPOSED AGREEMENT
4 REGARDING STREAM OR LAKE ALTERATION (the "Arbitration
5 Agreement").

6 l. The Arbitration Agreement names the arbitration panel as follows: Foothill
7 Representative Arbitrator Mark S. Armbruster, Esq., DFG Representative
8 Arbitrator Ron Rempel, and Neutral Arbitrator and Panel Chair The Honorable
9 Judge Diane Wayne (Ret.).

10 m. Except where the parties mutually agreed to modify the Arbitration Agreement,
11 pre-arbitration activities and the arbitration hearings were conducted according to
12 the Arbitration Agreement. Arbitration hearings were held on July 5, 6, 7, 19, 20.

13 **2. Evidentiary Findings.**

14 The evidence presented shows that Foothill and the DFG essentially disagree on two
15 issues: one, the proper geographical boundaries of the DFG's jurisdiction for the site; and two,
16 the conditions necessary to protect fish and wildlife resources within the DFG's jurisdiction.
17 Based upon the evidence presented, the arbitration panel makes the following evidentiary findings
18 with regard to these issues:

19 a. Based upon the terms of the Arbitration Agreement, Sections 1600 et seq.,
20 Sections 1280 et seq. of the California Code of Civil Procedure, and the evidence
21 presented by the parties, it is within the scope of the arbitration panel to determine
22 the proper geographical boundaries of the DFG's jurisdiction on the site and the
23 conditions necessary to protect fish and wildlife resources within the DFG's
24 jurisdiction.
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- 1 c. Throughout the history of the Project and these arbitration proceedings, the DFG
2 asserted three separate and distinct geographical delineations of its jurisdictional
3 boundaries: (1) the approximately 170-acre 100-year flood plain from 1995
4 through the end of 1998; (2) the 100-year flood plain plus an additional area of
5 approximately 40 acres (January 29, 1999); and (3) the approximately 265-acre
6 jurisdiction based upon composites of aerial photos prepared by Dr. Kevin Scott
7 (June 24, 1999).
- 8 d. Although Foothill did not agree with the propriety of the 100-year flood plain as
9 the DFG's jurisdiction, Foothill consented to and relied on the DFG's initial
10 assertion of jurisdiction over the 100-year flood plain in preparing the EIR and the
11 notification of streambed alteration.
- 12 e. Foothill presented substantial and credible evidence that its June 8, 1999 proposed
13 DFG jurisdiction includes the hydrologically active portions of the Project site
14 where hydrological activity is sufficiently frequent and sustained to support habitat
15 and wildlife dependent upon such hydrological activity. Foothill presented credible
16 evidence that it applied the jurisdictional methods identified by the DFG in the
17 DFG's Field Guide to Lake and Streambed Alteration Agreements in delineating
18 the June 8, 1999 proposed DFG jurisdiction.
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20 IV.

21 ARBITRATION AWARD AND JUDGMENT

22 NOW, THEREFORE, based upon the foregoing Findings, the arbitration panel issues the
23 following award and judgment to settle disagreements between Foothill and the DFG and make
24 binding decisions regarding the fish and wildlife modifications:
25

- 26 1. The Arbitration Agreement expressly allows the arbitration panel to issue its decision by
27 majority.
28

2. Except as modified herein, the Project shall be developed in substantial compliance with the Final Routing Plan dated October 20, 1999 (attached hereto as Exhibit A), which is in substantial conformance with the Project approvals and conditions imposed by the City. ~~The Project shall comply with all conditions~~ and mitigation measures set forth in the following: "Long-term Habitat Management Plan for Red Tail Golf and Equestrian" dated 30 December 1998, revised 8 June 1999 prepared for the DFG and Foothill Golf Development Group by Sapphos Environmental, Inc.; *Final Environmental Impact Report for Los Angeles Golf Club*, EIR No. 95-0286-(CUC)(CUB)(VAC), SCH No. 95051004, February 1996; *Los Angeles Golf Club Addendum* dated 9 May 1997, prepared for the City of Los Angeles; and "Conditional Use/Site Plan Review Conditions of Approval" for City Plan Case 96-0243 CUP and City Plan Case 96-0241 CUB, approved 28 April 1998 by the Los Angeles City Council.
3. Applying the statutory and regulatory definitions of the DFG's jurisdiction to the particular facts of the site and the evidence presented by the parties, the geographical boundaries of the DFG's jurisdiction on the Project site is as described and delineated in Foothill's proposed SAA conditions dated June 8, 1999 (attached hereto as Exhibit B).
4. The Project shall avoid all impacts within the jurisdiction of the DFG, shall not engage in any construction or development activities within the jurisdiction of the DFG, and shall not interfere with the natural existing wildlife or vegetation within the DFG's jurisdiction.
5. This award and judgment shall serve as the streambed alteration agreement between Foothill and the DFG. Because Foothill shall comply with all conditions and mitigation measures incorporated into the Project by the City and shall avoid all impacts and activity within the jurisdiction of the DFG, any listing of additional specific conditions on work in the DFG's jurisdiction is unnecessary.

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- 1 6. So long as Foothill avoids all impacts and activities within the DFG's jurisdiction, no
2 discretionary approvals or actions by the DFG regarding the Project are necessary or
3 warranted. The DFG's modifications to Foothill's December 30, 1998 notification of
4 streambed alteration are hereby superceded.
- 5 7. Except as to the proposed jurisdictional delineation of the DFG, Foothill's proposed SAA
6 conditions dated June 8, 1999 are denied and replaced by this award and judgment.
- 7 8. The DFG's proposed SAA conditions and proposed jurisdiction dated June 24, 1999 are
8 denied and replaced by this award and judgment.
- 9 9. Except as otherwise provided by law, Arbitration Panel Chair Diane Wayne in association
10 with JAMS shall retain jurisdiction over this matter to ensure compliance with the
11 mandates set forth in this arbitration award and judgment.
- 12 10. This Arbitration agreement shall be binding within five days after being signed by two of
13 the three Panelists.
- 14
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16 Dated: November 1, 1999

17
18

19 
20 Hon. Diane Wayne,
21 Neutral Arbitrator and Panel Chair

22 _____
23 Mark S. Armbruster, Esq.,
24 Representative

25
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6. So long as Foothill avoids all impacts and activities within the DFG's jurisdiction, no discretionary approvals or actions by the DFG regarding the Project are necessary or warranted. The DFG's modifications to Foothill's December 30, 1998 notification of streambed alteration are hereby superceded.
7. Except as to the proposed jurisdictional delineation of the DFG, Foothill's proposed SAA conditions dated June 8, 1999 are denied and replaced by this award and judgment.
8. The DFG's proposed SAA conditions and proposed jurisdiction dated June 24, 1999 are denied and replaced by this award and judgment.
9. Except as otherwise provided by law, Arbitration Panel Chair Diane Wayne in association with JAMS shall retain jurisdiction over this matter to ensure compliance with the mandates set forth in this arbitration award and judgment.
10. This Arbitration agreement shall be binding within five days after being signed by two of the three Panelists.

Dated: November 1, 1999

Hon. Diane Wayne,
Neutral Arbitrator and Panel Chair


Mark S. Armbruster, Esq.,
Representative

PROOF OF SERVICE BY MAIL

1013a (3) C.C.P.

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 South Figueroa Street, Suite 990, Los Angeles, California 90071.

On November 1, 1999, I served the foregoing document described as **ARBITRATION PANEL FINDINGS AWARD AND JUDGMENT** in the matter of **FOOTHILL GOLF AND DEVELOPMENT, LLC. VS. CALIFORNIA DEPARTMENT OF FISH AND GAME** on the interested parties in this action, as follows:

R.J. Comer, Esq.
David J. Altman, Esq.
CHRISTENSEN, MILLER, ET AL.,
2121 Avenue of the Stars, 18th Floor
Los Angeles, CA 90067

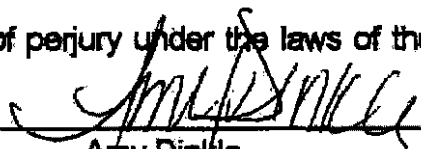
Stephanie Tom Coupe, Esq.
DEPARTMENT OF FISH & GAME
Legal Affairs Office
1416 Ninth St., Room 1335
P.O. Box 944209
Sacramento, CA 94244

(XX) **BY MAIL:** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

- () **BY PERSONAL SERVICE:** I delivered such envelope by hand to the above addressee(s).
- () **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to an overnight courier service (Federal Express), for delivery to the above addressee(s).
- () **BY FACSIMILE TRANSMISSION:** I caused the above-referenced document(s) to be transmitted to the above-named person(s) at the telecopy numbers on the attached list.

Executed on November 1, 1999.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Amy Dinkle